First Healthcare Corporation d/b/a Healthcare Corporation in the State of California d/b/a Hillhaven Highland House *and* Hospital and Service Employees Union, Local 399, affiliated with Service Employees International Union and Service Employees International Union, Local 22, affiliated with Service Employees International Union

First Healthcare Corporation d/b/a Healthcare Corporation in the State of California d/b/a Hillhaven Highland House *and* Hospital and Service Employees Union, Local 399, affiliated with Service Employees International Union

First Healthcare Corporation d/b/a Hillhaven Bakersfield and Hospital *and* Service Employees Union, Local 399, affiliated with Service Employees International Union and Service Employees International Union, Local 22, affiliated with Service Employees International Union. Cases 31–CA–20973, 31–CA–21091, and 31–CA–21551

September 30, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On July 21, 1998, Administrative Law Judge Steven M. Charno issued the attached bench decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions, the General Counsel filed exceptions, the Charging Party and the General Counsel each filed an answering brief to the Respondent's exceptions, the Respondent filed answering briefs to the Charging Party's and General Counsel's exceptions, and the Respondent filed reply briefs to the General Counsel's and the Charging Party's answering briefs. The American Health Care Association filed an amicus brief in support of the Respondent.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

I. PROCEDURAL ISSUE

The Respondent asserts that the parties were bound by a stipulation entered into by the parties on December 4, 1995, which was submitted to the Board on December 11, 1995, with a motion to transfer the proceedings in Cases 31–CA–20973 and 31–CA–21091.[3] The Board rejected the stipulation and remanded the proceedings on February 13, 1996. The Respondent contends that the parties had stipulated that the litigation of issues, other than the question of the right of access of employees who were not employed at the facility where they sought to engage in union activity, would be waived. The Respondent also contends that the remand of the proceeding for hearing was solely for determining the purpose of the employees for coming onto the property of the Respondent's facilities where they did not work. Thus, the Respondent argues that the judge improperly addressed allegations (and found violations) which were not part of the stipulation, thereby depriving the Respondent of its due process rights. We reject the Respondent's argument.

First, the parties stated in the motion to transfer proceedings that the record would consist of, inter alia, specified charges and amended charges, the amended consolidated complaint dated August 22, 1995, the Respondent's answer dated August 22, 1995, and the stipulation. The stipulation stated that the "central issue" is, in essence, the question of the right of employees to engage in Section 7 activities at the Respondent's facilities where they did not work. The parties did not eliminate or waive litigation of other issues.

Next, in rejecting the stipulation, the Board stated that it was remanding the proceeding:

> [A]s the briefs raise issues of fact and law which can best be resolved on the basis of a hearing before an administrative law judge. More particularly, the stipulation does not set forth whether the solicitation and distribution activities were organizational in character or were for some other purpose.

Thus, the Board rejected the stipulation and remanded the proceeding for a hearing to resolve the issues involved in this proceeding. Although noting a particular deficiency in the parties' stipulation, the Board did not limit the scope of the hearing.[4]

[3] The original charge in Case 31–CA–20973 was filed on January 3, 1995, the original charge in Case 31–CA–21091 was filed on April 6, 1995, and the consolidated complaint for these two cases issued on May 30, 1995, and an amended complaint issued on August 9, 1995.

[4] We note that the allegations related to Case 31–CA–21551 were not included in a complaint until the second consolidated complaint issued on February 5, 1998—after the Board rejected the stipulation and remanded the proceeding for hearing. (The charge in Case 31–CA–21551 was filed

We find that the General Counsel did not abandon or waive the litigation of any issues raised by the charges and complaints.

II. THE RULE AGAINST SOLICITATION AND/OR DISTRIBUTION

The judge found that the Respondent violated Section 8(a)(1) by maintaining and enforcing its rule against solicitation and/or distribution by nonemployees[5] in a manner to preclude its off-duty employees, who were engaging in union solicitation and/or distribution, from having access to its parking lots and other outside nonwork area at facilities of the Respondent's other than the facilities at which the employees worked.

On September 17, 1994, three nonemployee union organizers and Alfredo Chavez, an employee at Respondent's Alta Vista facility, went to the Respondent's Highland House facility. Chavez handed out flyers and talked with the employees in the parking lot outside the employees' entrance. The flyers pointed out the asserted benefits for union members. Chavez was later joined by union organizer Correa. The facility's administrator, Carol Bowman-Jones, then approached them. Both Correa and a Highland employee identified Chavez as a Hillhaven employee. Nevertheless, Bowman-Jones ordered Chavez to leave the property.

On July 12, 1995**,** Jenny Davenport, also an employee at Respondent's Alta Vista facility, and union organizers Gary Guthman and Carla Zombro met at the Respondent's Bakersfield facility. Davenport took some union literature, which discussed how to get involved in "fighting" for the Union, and went to an outdoor break area on the Respondent's Bakersfield premises. Davenport began talking with a Bakersfield employee about the asserted benefits of the Union. Supervisor Favereaux approached Davenport and told her that she was required to leave the property.

In finding that the Respondent violated Section 8(a)(1) by engaging in the above conduct, the judge relied on *Tri-County Medical Center*, 222 NLRB 1089 (1976). In that case, the Board held that, except where justified by business reasons, an employer rule that denies off-duty employees entry to outside nonworking areas of the employer's facility will be found invalid. The judge also noted that in *Postal Service*, 318 NLRB 466 (1995), the Board extended the *Tri-County* rule to protect off-duty employees engaging in Section 7 activity in outside nonworking areas of their employer's facilities other than where they worked.[6] The judge rejected the Respondent's argument that *Postal Service* and *Southern California Gas* should be limited to their facts (i.e., the employees, in both cases, were members of a bargaining unit which included the facility where they worked as well as the facility where they were engaging in the Sec. 7 activities). The judge found that the Board, in these two cases, did not rely on the fact that a multifacility unit was involved. The judge therefore concluded that the Respondent's maintenance and enforcement of the rule to exclude its off-duty employees from another facility from its property were unlawful. Finally, the judge, citing *Ohio Masonic Home*, 290 NLRB 1011 (1988), enfd. 892 F.2d 449 (6th Cir. 1989), rejected the Respondent's contention that it established a business justification for its rule.

The Respondent excepts, asserting that its employees who are not employed at the particular facility, whom the Respondent refers to as "stranger employees," do not have the same access rights to that facility as off-duty employees from that facility, even for organizational purposes, unless there is (1) a "strong community of interest" between employees of that facility and the one where the "stranger employees" work or, (2) a Board determination supporting a multifacility unit. Otherwise, the Respondent contends, employees from another facility are more akin to nonemployee union organizers than they are to off-duty employees from the facility to which they seek access. Accordingly, the Respondent submits that the holding in *Lechmere*, *Inc. v. NLRB*, 502 U.S. 527 (1992), that nonemployee organizational trespassing may generally be prohibited, is controlling here.

on September 22, 1995.) In a motion to the judge, dated June 4, 1998, to dismiss certain paragraphs of that complaint, the Respondent argued, inter alia, that the Respondent and the "Region" had agreed that the charge relating to the Bakersfield facility (Case 31–CA–21551) would be held "in abeyance as the outcome would be dictated by the disposition of the [other cases]." The only evidence that the Respondent submitted in support of this supposed agreement was the stipulation and a letter its attorney sent to the counsel for the General Counsel dated November 3, 1997. The stipulation does not refer to any agreement regarding Case 31–CA–21551. Further, in its letter to the counsel for the General Counsel, the Respondent objected to the consolidation of Case 31–CA–21551 with the other cases, noting that, "[a]ll parties agreed that a decision of the issue *as framed by the parties* [emphasis in the original] in Case Nos. 31–CA–20973 and 31–CA–21091, would govern Case No. 31–CA–21551." Thus, it is clear from Respondent's own assertions that, at most, any agreement was to hold Case 31–CA–21551 in *abeyance* until the Board made a determination on the issue *as framed by the parties*. As the stipulation was rejected and the proceeding remanded for hearing, it was appropriate to include the allegations in Case 31–CA–21551 in the second consolidated complaint.

[5] The Respondent's rule, in pertinent part, stated; "Non-employees are not allowed to solicit or distribute material while on facility property." Although the rule reads in terms of nonemployees, the Respondent has interpreted and applied the rule to off-duty employees employed at its other facilities.

[6] The judge also noted that in *Southern California Gas,* 321 NLRB 551 (1996), the Board, citing *Postal Service*, supra, reached the same result.

While this case was pending before the Board, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the Board's decision in a case presenting the same issue. *ITT Industries, v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001), vacating and remanding 331 NLRB 4 (2000). There, the Board had followed its prior decisions in *Southern California Gas Co.*, 321 NLRB 551 (1996), and *Postal Service*, 318 NLRB 466 (1995), applying the rule of *Tri-County Medical Center*, supra, to prevent an employer from denying access to visiting, offsite employees. Although the court's mandate in *ITT Industries* has not issued, and the Board has not yet requested or received additional briefing from the parties there, we are guided today by the court's decision.[7]

For the reasons that follow, we conclude that: (1) under Section 7 of the Act, offsite employees (in contrast to nonemployee union organizers) have a nonderivative access right, for organizational purposes, to their employer's facilities; (2) that an employer may well have heightened private property-right concerns when offsite (as opposed to onsite) employees seek access to its property to exercise their Section 7 rights; but (3) that, on balance, the Section 7 organizational rights of offsite employees entitle them to access to the outside, nonworking areas of the employer's property, except where justified by business reasons, which may involve considerations not applicable to access by off-duty, onsite employees. To this extent, the test for determining the right to access for offsite visiting employees differs, at least in practical effect, from the *Tri-County* test for off-duty, onsite employees.

1. Section 7 rights of offsite employees

We agree with the observation of the *ITT Industries* court, that the Supreme Court's decisions "certainly do not stand for the proposition that all trespassers, whether they be non-employee union organizers or offsite employees, possess only derivative [Section] 7 access rights." 251 F.3d at 1002. We conclude that offsite employees do possess freestanding, nonderivative access rights, even if such employees may be regarded as trespassers. In this respect, offsite employees are fundamentally different from non-employee union organizers, although the situation of offsite employees is not identical to that of onsite employee invitees. Compare, *Lechmere, Inc. v. NLRB*, supra (addressing access rights of nonemployee union organizers) with *Republic Aviation v. NLRB*, 324 U.S. 793 (1945) (protected activity by onsite employees), and *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (same).

Offsite employees are not only "employees" within the broad scope of Section 2(3) of the Act, they are "employees" in the narrow sense: "employees of a particular employer" (in the Act's words), that is, employees of the employer who would exclude them from its property. Clearly, then, these workers are different in important respects from persons who themselves have no employment relationship with the particular employer. Here, the Section 7 rights implicated involve not just the shared interests of statutory employees as members of the working class, or as employees working in the same sector, industry, or community, but as employees working for the same employer. Nothing in either the Act or the Supreme Court's decisions establishes that the Section 7 rights of the employees of a particular employer, *as against that employer*, are somehow derivative of other employees' rights, when they are exercised at a location other than the customary site of employment.

When an offsite employee seeks to encourage the organization of similarly situated employees at another employer facility, the employee seeks to further his own welfare. In attempting to organize the unorganized, employees seek strength in numbers to increase the power of their union and ultimately to improve their own working conditions. See *Food & Commercial Workers Locals 957, 7, & 1036 (Meijer, Inc.)*, 329 NLRB 730, 734 (1999) ("[T]here is abundant evidence that, in collective bargaining, unions are able to obtain higher wages for the employees they represent . . . when the employees of employers in the same competitive market are unionized").[8]

Section 7 clearly and directly protects such activity. The Supreme Court has recognized that the scope of Section 7 extends even to concerted activity where employees "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels *outside the immediate employee-employer relationship*." *Eastex, Inc.*, supra, 437 U.S. at 565 (emphasis added). Where offsite employees seek to organize fellow employees, they act *within* the immedi-

[7] On remand in *ITT Industries*, of course, the Board may wish to refine or supplement the analysis offered here, in response to the arguments made by the parties in that case.

Our dissenting colleague asserts that the court's decision in *ITT Industries* supports his position that the employees in this case are not legally entitled to access to their employer's property. The court in *ITT Industries*, however, did not decide whether the employees in that case were entitled to access to their employer's property; instead, it remanded the issue to the Board for further explanation of its holding. *ITT Industries* therefore does not support our dissenting colleague's position.

[8] The United States Court of Appeals for the Ninth Circuit initially reversed the Board's decision in *Meijer, Inc.*, supra, in part 249 F.3d 1115, rehearing en banc granted 265 F.3d 1079 (9th Cir. 2001). But the court's action did not implicate the uncontroversial proposition that organizing one group of employees can benefit another.

ate employee-employer relationship. The core concerns of Section 7, which protects the "right to self-organization," undeniably are implicated.

The offsite employee's personal stake in organizing his counterparts at a different employer facility is clearest where he is, or will be, part of a multifacility bargaining unit that includes onsite employees. But a similar self-interest arises even where the unorganized employees may be in a different bargaining unit.[9] Precisely because they work for the same employer, even at different workplaces, employees will often have common interests and concerns related to wages, benefits, and other workplace issues that may be addressed by concerted action. These shared interests, as we have suggested, are not limited to circumstances in which employees have the same employer (as opposed to, for example, an employer in the same industry or same market), but they are certainly enhanced in that case. Thus, employees may reasonably believe—indeed, they presumably did believe in this case—that organizing employees at a different facility, even in a different potential bargaining unit, could bolster their efforts to improve their own working conditions. It seems correspondingly clear that the unorganized status of fellow employees at one facility can undermine the gains or potential gains won by the union elsewhere.

It is true, as the *ITT* court observed, that the "interests of employees located on a single employer site do not always coincide with the collective interests of employees located on several different sites." 251 F.3d at 1005. The fact remains that employees often will share significant interests, even if their interests are not identical. In a particular case, the fact that offsite employees are seeking to organize their fellow employees suggests that they believe there *is* a basis to make common cause. There is some merit in taking into account employees' judgments of their own interests.

For all of these reasons, we conclude that the Section 7 rights of offsite employees are nonderivative and substantial.

2. Employer's private property concerns

The *ITT Industries* court observed that offsite employees—in contrast to onsite employees (at least those who are on-duty)—may be regarded as trespassers by the employer. The court held that this fact must be considered in weighing the access rights of offsite employees.

Broadly viewed, of course, any employee engaged in activity to which the employer objects on its property, might be deemed a trespasser, not an invitee: the employer arguably is free to define the terms of its invitation to employees. There is an inherent tension, then, between an employer's property rights and the Section 7 rights of its employees. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 fn. 8 (1945) ("Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining"). The "task of the Board," as the Supreme Court has made clear, "is to resolve conflicts between [Section] 7 rights and private property rights, and to seek a proper accommodation between the two." *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976). A proper accommodation "may largely depend upon the content and the context of the [Section] 7 rights being asserted." Id. With respect to the access rights of off-duty, onsite employees, the Board's accommodation (the *Tri-County* rule) has been widely accepted by the courts. See *ITT Industries*, supra, 251 F.3d at 999.

We recognize that the situation of offsite employees implicates some distinct considerations. On one view, such employees are (as the Respondent here describes them) "strangers" to the employer, in contrast to off-duty, onsite employees. (As we have observed, however, even onsite employees arguably are trespassers on the employer's property if they seek access while off duty, a time when they have not been invited onto the property.) Of critical importance, on the other hand, is the fact that an employment relationship exists between them and the employer, which distinguishes offsite employees from the ordinary trespasser, who truly is a stranger. The existence of an employment relationship, in turn, means that the employer has a lawful means of exercising control over the offsite employee (even regarded as trespasser), independent of its property rights. Surely it is easier for an employer to regulate the conduct of an employee—as a legal and a practical matter—than it is for an employer to control a complete stranger's infringement on its property interests. The employer, after all, controls the employee's livelihood.

This is not to say, however, that in protecting its interests and preserving its property rights, an employer dealing with offsite employees faces precisely the same situation as it would when confronted by the access claims of onsite employees. The employee status of offsite employees, for example, may be more difficult to determine, at least initially. There may be other, unique problems involved, as well, as the *ITT Industries* court observed. 251 F.3d at 1005 ("employer's right to control the disputed premises likely implicates security, traffic

[9] Because employers and unions may agree to merge organized facilities into multifacility bargaining, employees at a newly organized facility could become part of an existing bargaining unit that includes previously organized facilities.

control, personnel, and like issues that do not arise when only onsite employee access is involved").

We believe, however, that in this context, an employer's property interests, as well as its related management interests, may be given due recognition without granting it the unqualified right to exclude offsite employees pursuing organizational activity. That result, which would effectively foreclose the exercise of Section 7 rights, is inconsistent with the Supreme Court's admonition that the "[a]ccommodation between employees' [Section] 7 rights and employers' property rights . . . 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.'" *Hudgens*, supra, 424 U.S. at 521, quoting *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956).

3. Balancing Section 7 rights and property concerns

On balance, rather, the Section 7 organizational rights of offsite employees entitle them to access to the outside, nonworking areas of the employer's property, except where justified by business reasons. In weighing those reasons, we will take into account an employer's "predictably heightened property concerns" (in the words of the *ITT Industries* court) when offsite, as opposed to onsite, employees are involved.

In some cases, an influx of offsite employees might raise security problems, traffic control problems, or other difficulties that might well justify an employer's restriction (or even prohibition) of such access. Appropriate measures might also be justified, for example, to require apparent trespassers to identify themselves and thus to determine whether the person seeking access is, in fact, an offsite employee of the employer.

We caution, however, that an employer must demonstrate why its security needs or related business justifications warrant restrictions on access by offsite visiting employees. We will review an employer's proffered justification carefully, on a case-by-case basis.

III. APPLICATION OF THE ANALYSIS TO THIS CASE

We now apply the above considerations to this case. Here, employees Chavez and Davenport sought access, respectively, to the Respondent's Highland facility and its Bakersfield facility—facilities other than the facility at which they worked. As offsite employee visitors, they sought to promote their Union, and the benefits it offered, to onsite employees at Highland and Bakersfield. We conclude that employees Chavez and Davenport were exercising their Section 7 rights to organize, to strengthen their own Union and ultimately to better their own working conditions. Accordingly, these employees had a freestanding, nonderivative right of access under the Act.

In entering onto the Respondent's parking lot or outside break area, they entered against the wishes and the rule of the Respondent and thus, to that extent, trespassed on its property. However, as this case involved two instances where a single visiting employee entered an outside area of a Respondent facility, we find that the interference with the Respondent's property interests was not substantial.

Critically, we examine the Respondent's business justifications for its prohibition. The Respondent primarily contends that it must prohibit access to offsite organizing employees in order to provide for the "welfare, peace and tranquility" of its nursing home residents. However, the offsite employees here did not enter the nursing homes where they would be most likely to come into direct contact with patients. Moreover, as the judge noted, the Respondent's witness, Dr. Stone, a geriatric specialist, admitted that a new face on premises might as likely stimulate as disturb one of the residents. Further, the Respondent failed to show how a visiting employee organizer might disturb residents any more than a visiting deliveryman or a visitor coming to see a resident.

The Respondent also submits that, given its many facilities and employees, it would be extremely difficult and burdensome to keep track of all its employees. However, we are not persuaded that the Respondent has established this defense. Here, again, a single offsite employee sought access at a Respondent facility. In denying access, the Respondent did not contend that it was unable to determine whether the offsite visitor (i.e., Chavez or Davenport) was in fact one of its own employees.

Finally, the Respondent contends that its no access rule was justified because of the Union's "dignity campaign." According to the Respondent, the judge prevented it from introducing evidence to establish that the Union and its supporters had previously engaged in violent and disruptive actions. The Respondent of course would be privileged to deal with and seek to prevent any such actions occurring on its property. However, its rule was not tailored to address violent and disruptive acts. Rather, the Respondent would prohibit all access by offsite visiting employees. Indeed, employees Chavez and Davenport acted appropriately and with decorum in attempting to engage in organizational activity. Thus, we agree with the judge that the Respondent could not establish its business justification defense by reference to alleged union activity occurring at other places and at other times.

We therefore conclude that the Respondent violated Section 8(a)(1) by maintaining a provision of its solicitation and distribution policy which it enforced to prohibit the employees of one of Respondent's facilities from gaining access to the nonworking outside areas at any other facility for the purpose of union organizing and enforcing that provision.[10]

THE REMEDY

To remedy the violations found, the judge recommended that the Respondent be required to post cease-and-desist notices at the three facilities directly involved in this proceeding. The General Counsel and the Charging Party except and seek a broader posting. The General Counsel urges that the Respondent be required to post a notice at all its facilities in California. The Charging Party seeks a nationwide posting.

We shall order that the Respondent post the notice at all its nonunion facilities in California. On the record before us, we are satisfied that the Respondent maintained an unlawful rule, as described in footnotes 5 and 10 of this decision, at these facilities. Accordingly, it is appropriate to require posting at all these facilities. See *Raley's*, 311 NLRB 1244 fn. 2 (1993).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Vencor and Nursing Centers West, LLC d/b/a, inter alia, Highland Nursing & Rehabilitation Center and Californian Care Center, formerly First Healthcare Corporation d/b/a Delaware First Healthcare Corporation and in the State of California (Hillhaven) d/b/a, inter alia, Hillhaven Highland House and California Care Center, its officers, agents, successors, and assigns, and shall take the action set forth in the Order as modified.

Substitute the following as paragraph 2(b).

"(b) Within 14 days after service by the Region, post at all of its nonunion facilities in the State of California copies of the attached notice marked 'Appendix C.'[4] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 3, 1994."

CHAIRMAN HURTGEN, dissenting.

I do not agree that the Respondent's employees at one facility have a Section 7 right to come onto the property of another facility of the Respondent, for the purpose of organizing the employees of the latter facility.[1] I do not quarrel with the proposition that the Respondent's employees are "employees" within the meaning of the Act. Nor do I dispute the notion that their effort to organize employees at a different site is protected by Section 7. The issue is one of balancing this Section 7 right and employer property rights. For the reasons expressed below, I find that the balance in this case favors the property right.

The case falls between two landmark Supreme Court cases. In *Republic Aviation Corp. v. NLRB*,[2] employees at an employer's facility sought to organize their fellow-employees at that same facility. The Court held that, in general, those employees had a right to do so, provided that the solicitation was confined to nonworktime and distribution was confined to nonworktime and nonwork areas.

In *NLRB v. Babcock & Wilcox*[3] and in *Lechmere, Inc. v. NLRB*,[4] union organizers (nonemployees of the employer) sought to come onto the employer's property in order to organize the employees there. The Court held that, in general, there was no such right of access.

The instant case involves persons who are employees of the Employer, but who are not employed at the facility

[10] As noted, above, we rejected the Respondent's contention that this case was limited to the issue regarding the off-duty employees seeking access at a facility other than where they worked. The judge also found that the Respondent, at least until July 12, 1995, maintained a rule for its nonunion service staff in California, which stated that "When you are off duty, don't return to the facility unless you are picking up your paychecks or are making an authorized visit." The judge found that the provision unlawfully prohibited off-duty employees from returning to the nonwork areas of their own facility unless "authorized" and therefore violated Sec. 8(a)(1). The Respondent contends that there was no violation because there was no evidence that any employee was barred from returning to the outside portion of the nursing center where they worked. We reject the Respondent's argument and agree with the General Counsel and the judge that the maintenance of the rule violated Sec. 8(a)(1).

[1] I agree with my colleagues' findings to the extent that they find that the Respondent, at least until July 12, 1995, maintained a rule that unlawfully limited the right of off-duty employees to enter the nonwork area *of the facility where they worked* to engage in organizational activity. However, in this regard I would limit the Respondent's obligation to post a notice to three facilities, as recommended by the judge.

[2] 324 U.S. 793 (1945).

[3] 351 U.S. 105 (1956).

[4] 502 U.S. 527 (1992).

where they seek access. Thus, the case is controlled by neither *Republic Aviation* nor *Lechmere*.

More relevant is *Hudgens v. NLRB*.[5] In that case, factory employees of Butler Shoe were on strike. In connection with that strike, they sought to picket at a Butler Shoe retail store which was located in a shopping mall. The Supreme Court noted, as discussed above, that the case was controlled by neither *Republic Aviation* nor *Babcock*. As to the former, the Court noted that *Republic* involved organizational activity "by employees already rightfully on the employer's property."[6] As to *Babcock*, that case involved organizational activity by nonemployees of the employer. By contrast, *Hudgens* involved strike/picketing activity by employees of the employer, albeit at a different location. In addition, the Court noted that the property involved in *Hudgens* was that of a third party (the shopping mall owner).

In light of these differences, the Court remanded for an accommodation between the Section 7 rights involved and the property rights involved. On remand, the Board balanced the rights and found the violation.

The instant case differs from *Hudgens*. In *Hudgens*, the employees at the shoe store were directly pursuing their own Section 7 right to strike and to bring economic pressure to bear on their employer. Obviously, an important part of that pressure was to persuade potential customers to withhold their patronage from Butler during the strike. Equally obviously, that pressure could be exerted by picketing at the Butler retail store.

By contrast the employees here are not directly pursuing their own interests. They are already organized. They wish to go elsewhere to assist other employees in their organizational efforts. To be sure, the successful organization of the latter employees may redound to the benefit of the already organized employees. But, clearly, the interest is not the direct one possessed by the striking/picketing Butler employees.

In sum, although the employees here have a Section 7 right to assist employees elsewhere in their organizational drive, it does not follow from *Hudgens* that they have a Section 7 right to come onto the property of the Respondent at a facility where they do not work.

My position is clearly supported by the D.C. Circuit's opinion in *ITT Industries v. NLRB*, 251 F.3d 995 (2001). In that case, the court held that the Board had not shown that offsite off-duty employees have a right to come onto the property of their employer, *even where the employees at the two facilities were in the same bargaining unit*. Notwithstanding that all employees were in the same unit, the court noted that the two sets of employees might well have different interests. In my view, it follows a fortiori that employees in *different* bargaining units do not have common interests. The fact that they are in separate units means that it has not been shown that they share a "community of interest."[7]

The court in *ITT* noted that the offsite employees are trespassers at the site where they do not work. That is, they are not business invitees. That is also true in the instant case.

My colleagues say that the Respondent has not shown that the intrusion of the offsite employees has created a security or health-care problem. Assuming that this is so, it does not aid the General Counsel's case. The issue here is Section 7 rights versus property rights. In our system of jurisprudence, property rights themselves have value. Where, as here, those rights are not outweighed by Section 7 rights, those property rights must prevail.

Tri-County Medical Center[8] is wide of the mark. That case involves off-duty employees who seek access to the facility *at which they work*. *Postal Service*,[9] while closer to the mark, is also distinguishable. In that case, the employees at all postal facilities were in the same unit and were represented by the same union. They therefore had a common interest in the election of officers in that union. The interest was common, direct, and immediate.

Similarly, in *Southern California Gas*,[10] the employees were in one common unit and they shared a common interest in opposing the settlement of a lawsuit that affected all of them.

My colleagues also rely on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1996). That case is also wide of the mark. That case held that employees could engage in Section 7 *activity at the site where they worked*, even though their Section 7 activity involved concerns that were broader than the immediate employer-employee relationship. By contrast, the instant case involves employees who seek to engage in Section 7 activity at a site *other than the one at which they work*.

Similarly, *Food & Commercial Workers Locals 951, 7, & 1036 (Meijer, Inc.)*, 329 NLRB 730 (1999), is not on point. That case did not involve employee access to property at which they did not work. Thus, there was no necessity for balancing Section 7 rights and property rights.

[5] 424 U.S. 507 (1976).

[6] See *Hudgens*, supra at fn. 10.

[7] My colleagues say that the two units could be merged into one. However, there is no indication that this will occur or that it is even contemplated.

[8] 222 NLRB 1089 (1976).

[9] 318 NLRB 466 (1995).

[10] 321 NLRB 551 (1996).

In my view, an employer can ordinarily post its property against intrusion by outsiders, i.e., those who do not work at the facility in question. *Hudgens* and *Postal Service* are exceptions to this rule. The exceptions are grounded in the direct and immediate interest of the employees who sought access in those cases. Those exceptions are not applicable here.

Thus, I find no violation in the Respondent's denial of access to the employees involved here.

Mori Pam Rubin, Esq., for the General Counsel.
John V. Nordland, *Esq*. and *Joseph P. Ryan*, *Esq. (Nordland & Miller, P.C.)*, of Larkspur, California, and *Kenneth M. Hurley, Esq*., of Westminster, California, for the Respondent.
Andrew Strom, Esq., of Los Angeles, California, for the Charging Party.

DECISION AND CERTIFICATION

STEVEN M. CHARNO, Administrative Law Judge. This case was tried before me in Los Angeles, California, on June 8–11, 1998. After oral argument, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations. Appendix A is the portion of the transcript containing my decision,[1] while Appendix B contains corrections to that transcript. [App. B omitted from publication; errors in the transcript have been noted and corrected.] In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of the amended transcript containing my decision. Based on the findings of fact and conclusions of law contained therein and on the entire record in this case,[2] I issue the following recommended[3]

ORDER

The Respondent, Vencor Nursing Centers West, LLC d/b/a, inter alia, Highland Nursing & Rehabilitation Center and Californian Care Center, formerly First Healthcare Cooperation d/b/a Delaware First Healthcare Corporation in the State of California (Hillhaven) d/b/a, inter alia, Hillhaven Highland House and Californian Care Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing a rule that prohibits its off-duty employees from returning to its facilities except to pick up paychecks or make a visit authorized by it.

(b) Enforcing its rule against solicitation or distribution by nonemployees on facility property in a manner so as to preclude its off-duty employees, who are engaging in union solicitation and/or distribution, from having access to its parking lots and other outside nonwork areas at facilities of Respondent other than the facilities to which they are assigned to work.

(c) Denying its off-duty employees, who are engaging in union solicitation and/or distribution, access to parking lots and other outside nonwork areas on the premises of facilities other than the ones to which the off-duty employees are assigned to work.

(d) Promulgating, maintaining,or enforcing a rule prohibiting its employees from distributing literature not approved by it in nonwork areas during nonwork times.

(e) Informing its employees that they may not distribute literature in nonwork areas during nonwork times.

(f) In any like or related manner interfering with, restraining,or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent it has not already done so, rescind the rule contained in its employee handbook which states that employees who are off duty may not "return to the facility unless [they] are picking up [their] paycheck or making an authorized visit" and notify its employees, in writing, that it has done so.

(b) Post at its Alta Vista, Highland House, and Californian Care Center facilities copies of the attached notice marked "Appendix C."[4] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the second amended complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

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The other provision of solicitation and distribution provision is the one which says that off-duty employees may not essentially return to the premises, et cetera, and specified reasons which don't include exercising their Section 7 rights.

MS. RUBIN: Okay. The first part as applied would be unlawful. It is not unlawful on its face; it's as applied, applying it to off-duty employees from other facilities.

The other portion of the rule is illegal on its face and as applied; but it's facially invalid, on the third part is facially invalid. The reference to non-employees is only invalid insofar as it's invoked against employees from other facilities.

[1] Due to an error by the Board's reporting contractor, I first received a copy of these transcript pages on July 1, 1998.

[2] I have also considered the post-hearing submissions relating to remedy made by counsel for the General Counsel and Respondent.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice "Posted by Order of the National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

JUDGE CHARNO: Thank you. Why don't you give me an hour and a half and I'll see what I can do in that length of time and I'll check back with you at—I guess it would be 4 o'clock.

MR. NORDLUND: Your Honor, could we give you a little more time, 3:30, and that will give us the time to get some copies and checked out of the hotel and—

JUDGE CHARNO: Certainly. 3:30's fine.

(Off the record.)

JUDGE CHARNO: In response to timely charges being filed, a second consolidated Complaint was issued on February 5, 1998, which, after Charging Party's withdrawal of certain allegations, alleged that Vencor Nursing Centers West, LLC, d/b/a inter alia, Highland Nursing and Rehabilitation Center and Californian Care Center,

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formerly, First Healthcare Corporation, d/b/a, Delaware First Healthcare Corporation in the State of California (Hillhaven), d/b/a inter alia Hillhaven Highland House and Californian Care Center, hereinafter Respondent, had violated Section 8(a)(1) of the National Labor Relations Act as amended, hereinafter the Act, by interfering with and restraining its employees in the exercise of their rights under the Act.

Respondent's answer denied the commission of any unfair labor practice. A hearing was held before me in Los Angeles, California on June 8 through 11, 1998. At the conclusion of the evidentiary presentations I heard oral argument.

Based on that argument, and on the briefs and pleadings submitted prior to the hearing, which are incorporated in the record as Administrative Law Judge's Exhibits 1 through 15, and on the record as a whole I make the following findings.

Respondent is a corporation engaged in the operation of nursing homes at various locations in California, including skilled nursing facilities in Highland and Bakersfield.

Respondent in the conduct of its business purchases and receives at its Highland and Bakersfield facilities goods or services valued in excess of $5,000.00 from, one, outside the state and, two, from enterprises in California which receive such goods from points outside the state.

Respondent derives gross revenues in excess of $100,000.00 from the operation of its California facilities. Respondent is

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admitted to be, and I find is, an employer engaged in commerce within the meaning of the Act.

It is admitted and I find that Hospital and Service Employees Union Local 399 affiliated with the Service Employees International Union is a labor organization within the meaning of the Act. It is uncontested, and I find that Service Employees International Union Local 22 affiliated with Service Employees International Union was a labor organization within the meaning of the Act throughout 1994 and 1995.

Beginning no later than January, 1990, Respondent's successive employee handbooks for its non-union service staff in California have included a solicitation and distribution rule with two provisions relevant to this proceeding.

The first states "When you are off duty, don't return to the facility unless you are picking up your paycheck or are making an authorized visit." The term "authorized visit," was defined in Respondent's February 13, 1995 letter to counsel for General Counsel as a return to the facility for "a work/job-related reason."

The period during which this provision was enforced is in dispute. While Respondent has placed in evidence an employee handbook purportedly effective in January, 1995, which does not contain the provision, that handbook unlike its predecessors is not explicitly applicable to non-union service staff.

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In addition, Respondent's June 1, 1995 memo to the heads of all its non-union California facilities provides "Employees are not to return to their own facilities for reasons "other than those contained in the handbook."

I infer from this instruction that the handbook in effect for non-union facilities was one other than the handbook which appears in the record of this proceeding. This inference is supported by the evidence of Maria Favereaux, a stipulated supervisor, who testified that, as of July 12, 1995, employees at the Bakersfield facility were not allowed on Respondent's premises if they were not scheduled to work.

Parenthetically, I should note that testimony after that of Ms. Favereaux by Respondent's labor and employment counsel to the effect that Favereaux was mistaken, even if credited, does not negate Favereaux's maintenance of the rule in July of 1995.

Respondent's labor and employment counsel did not address the June 1, 1995 memo in his testimony. For the foregoing reasons I find that Respondent's rule prohibiting off-duty employees from returning to Respondent's facilities was in effect through at least July 12th, 1995.

The second provision of Respondent's solicitation and distribution policy of significance here states, quote, "Non-employees are not allowed to solicit or distribute material while on facility property," period, close quote.

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It is uncontested that this provision, one, was in effect and enforced by Respondent until at least the commencement of the hearing of this case; and, two, prohibited the employees at one of Respondent's facilities from gaining access to the non-working outside areas at any other facility for the purpose of solicitation and distribution, including solicitation and distribution relating to union organizing.

On September 17th, 1994 three non-employee union organizers and Alfredo Chavez, an employee at Respondent's Alta Vista facility assembled at Respondent's Highland facility, just prior to the 3 p.m. shift change. Chavez was asked by union organizer Blanca Correa to hand out flyers and to talk with the Highland employees in the parking lot outside the employees' entrance at the back of the facility.

The flyers Chavez was given pointed out the benefits accruing to union members, solicited the recipients to join the union and contained a postage prepaid card which could be returned for additional "information about joining the Service Employees International Union."

Chavez spoke with approximately four employees before he was joined shortly after 3 p.m. by Correa. Chavez spoke with

four additional Highland employees before he and Correa were approached by Carol Bowmen-Jones, the head of the Highland facility.

It is undisputed that, one, Bowmen-Jones

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saw Chavez distributing the same literature she had identified when driving onto the property as union literature; two, Correa identified Chavez as a Hillhaven employee, a fact which was confirmed for Bowmen-Jones moments later by a Highland employee; and, three, Bowmen-Jones ordered Chavez to leave Respondent's property.

Parenthetically, it should be noted that Respondent's absolute right to order non-employee union organizers to leave its property is not in dispute in this proceeding.

At approximately 2 p.m. on January 26th, 1995 a group of nonemployee union organizers and individuals employed by Respondent at other facilities assembled at the Highland facility in order to hand out union literature which, one, disputed Respondent's prior claim that the union made promises it "could not keep," and, two, invited the Highland employees to join the union.

It is uncontroverted that approximately 45 minutes later Jack Quiroz, the admitted maintenance supervisor at Highland, was observed shutting the facility's back gate which required the gate thereafter to be manually opened to allow cars to enter or exit the facility through that gate. The main entrance and exit to the facility were at the front of the building.

Approximately 2 p.m. on July 12, 1995, Jenny Davenport, an employee at Respondent's Alta Vista facility, and union organizers Gary Guthman and Carla Zombro met at Respondent's

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Bakersfield facility in order to speak with employees about joining the union and to distribute literature soliciting inquiries on "how to get involved in fighting for union rights for your facility."

Upon arriving, Davenport took some of the union literature and went to an outdoor break area next to the parking lot on Respondent's premises. Once there, she began talking with a Bakersfield employee about the benefits of unionization.

It appears uncontested that shortly thereafter Supervisor Favereaux emerged from the building and approached Davenport. The latter's credible testimony that she was wearing an employee ID card provided by Respondent during this encounter was supported by Favereaux's recollection that Davenport was wearing an ID card which appeared to have Respondent's logo on it.

While the recollection of both witnesses was demonstrably dimmed by the passage of time, it appears uncontested that Davenport asserted a legal right as one of Respondent's employees to be on the grounds of Respondent's facility and Favereaux reentered the building to call Respondent's lawyer. On balance, I find Favereaux's testimony concerning the events of July 12 to be more reliable than the conflicting, internally inconsistent accounts of Davenport, Guthman and Zombro.

Favereaux thereafter reemerged from the building in the company of Tim Haub, the admitted environmental services manager and a stipulated supervisor at the Bakersfield facility. It appears uncontested that Favereaux told Davenport that the latter was required to leave the property thereby preventing Davenport from speaking further with her fellow employees or

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distributing union organizing literature.

As Haub and Favereaux escorted Davenport from the property they were approached by Guthman, who had advanced onto Respondent's property. During the ensuing interchange Haub stated that employees could not distribute materials on Respondent's property, quote, "unless they had the approval of management." Guthman's testimony concerning Haub's statement is effectively unrebutted.

Given the foregoing findings and based on the record in its entirety, I find that the solicitation and distribution engaged in by Respondent's employees on September 17, 1994; January 26th, 1995; and July 12, 1995 had an organizational objective.

Respondent argues that the Charging Party had an agenda going far beyond merely organizing employees at the Highland and Bakersfield facilities. I find it difficult to conceive of a situation in which the organization of employees by their fellow employees would not have an effect on many other goals held by a labor organization.

Respondent has not identified any authority indicating that the existence of such goals on the part of the union should nullify the Act's protection of an employee's right to organize his or her fellows.

General Counsel contends that the provision which prevents off-duty employees from returning to Respondent's facility is so

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impermissively broad as to be invalid on its face.

Tri-County Medical Center, 222 NLRB 1089, invalidates any rule denying off-duty employees entry to outside, nonworking areas on an employer's property except where justified by business reasons.

I agree that the language of this provision is sufficiently ambiguous to run afoul of the rule in Tri-County Medical Center. Because there is no probative evidence in the record which would indicate the existence of a business justification for this provision, I find it to be an unfair labor practice violative of Section 8(a)(1) of the Act.

General Counsel and Charging Party argue that Respondent's interpretation of the rule which bars non-employee solicitation and distribution so as to include solicitation and distribution by off-duty employees of Respondent who are engaged in organizational activities at one of Respondent's facilities other than the one at which they're employed is unlawful.

More specifically, General Counsel and Charging Party argue that *United States Postal Service*, 318 N.L.R.B. 466, and *Southern California Gas*, 321 N.L.R.B. 551, extend the Tri-County rule to protect any off-duty employee seeking access to the outside non-working areas of one of his employer's facilities other than the facility at which the employee works.

Respondent argues that the United States Postal Service and Southern California Gas should be limited to the precise

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facts of the two cases, that is, situations where employees at the various facilities are part of the single, multi-facility bargaining unit or share a "community of interest," as that term is used in making unit determinations.

The Board's decision in United States Postal Service explicitly adopts certain elements of the Administrative Law Judge's decision, but makes no mention of the facts which Respondent relies upon to distinguish that decision from the instant case.

Similarly, the Board's decision in Southern California Gas is summary in nature, does not mention the facts relied upon by Respondent, but explicitly relies "particularly," on the decision in the United States Postal Service.

I therefore find that the factual distinctions between United States Postal Service and Southern California Gas, on the one hand, and the case before me, on the other hand, have not been shown to be decisionally significant.

Accordingly, I conclude that Respondent is not justified in treating an employees as a "non-employees" at ant of its facilities other than the one at which the employee works. I, therefore, conclude that Respondent's interpretation of the second provision of its solicitation and distribution policy is also invalid unless justified by business reasons.

Respondent argues that barring off-duty employees from

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access to the outside non-working areas of its properties is required to prevent nursing home residents from potentially harmful and disruptive effects.

None of the witnesses who testified concerning the rule had a part in its formulation. Accordingly, there is no evidentiary basis for a finding concerning the reason for which the rule was initially promulgated. The head of Respondent's Bakersfield facility testified that the relevant portions of Respondent's solicitation and distribution rule were required for "security reasons," in that Respondent is responsible for the well-being of its residents.

Dr. Stone, Respondent's expert on geriatrics, candidly admitted that seeing a new face on Respondent's premises could have either a beneficial effect or a disruptive effect on the nursing home residents.

Even if one assumes that a ban on the presence of non-employees might be justifiable, the record contains no convincing basis for distinguishing between the non-disruptive behavior of off-duty employees who work at a facility and the non-disruptive presence of off-duty employees from another facility whom Respondent classifies as non-employees.

Indeed, it would seem a fair inference that all of Respondent's nursing home employees regardless of their place of employment should understand the standard of behavior required

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of them in the presence of Respondent's residents. This would seem especially likely in view of the uncontested evidence in the record that the population of any given nursing home is remarkably similar overall to the population of other nursing homes.

There is no evidence that any resident of one of Respondent's nursing homes has ever been aware of, let alone complained about or suffered any type of discomfort as a result of, the activities of off-duty employees engaged in organizational activities in the outside non-work areas of Respondent's facilities.

Under the foregoing circumstances, I conclude that Respondent has not demonstrated a business justification for its rule, see *Ohio Masonic Home*, 290 N.L.R.B. 1011 (1988), in parenthesis. I therefore conclude that the rule as interpreted by Respondent to bar off-duty employees from engaging in organizational solicitation and distribution at its facilities other than the one at which they work is unlawful.

Accordingly, Respondent's enforcement of this rule and the exclusion of its employees from its property on September 17th, 1994 and July 12, 1995 are violations of Section 8(a)(1) of the Act, as is the distribution rule promulgated by Haub on July 12, 1995. Respondent's actions on January 26th, 1995 were not shown to have interfered with the exercise of its employees' Section 7 rights. An appropriate order will issue.

Are there any other matters to take up before I close the

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record?

MR. STROM: Yes, Your Honor.

JUDGE CHARNO: Yes.

MR. STROM: With respect to the scope of the remedy—

JUDGE CHARNO: Yes.

MR. STROM:—the Charging Party would request that the remedy go state-wide. And the basis for that is that Respondent put in evidence that the policy was a policy which applied statewide. And under a *Big Buy Foods*, 315 N.L.R.B. 1083, the Board made the following finding, "We find that company-wide posting requirement appropriate in light of the Judge's finding that the Respondent unlawfully denied access at the six stores pursuant to company-wide solicitation guidelines which discriminatorily exclude unions," period.

MR. NORDLUND: Your Honor, if I might—

JUDGE CHARNO: Before you do, does General Council have a position on that?

MS. RUBIN: I do. Initially the Charging Party made this request at the inception of the litigation. During the time of the investigation, the Region took the position at that time we would not—it was General Council's position that we would not be seeking that because at that point we didn't have evidence that the rule was in effect at more than the facilities in question.

Now, in light of the record as it now stands and the fact

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that it's now been established that the rule was in effect throughout the State of California or multiple facilities, we would now join in that request.

JUDGE CHARNO: Your Honor, there is no evidence in the record that the rule was publicized or enforced at any facilities other than Highland and Bakersfield on the dates in question.

JUDGE CHARNO: What do I do with that June 1st memorandum, June 1st, 1995 memorandum to all of the administrators in California at non-union facilities?

MR. NORDLUND: But that was not published to employees. The notice is for the purposes of informing employees of their Section 7 rights. It's not to inform the administrators.

MR. STROM: Your Honor, I believe that Respondent is stopped from making this argument. Respondent argued previously and presented evidence claiming that the handbooks were distributed to all employees, whether or not you found that.

JUDGE CHARNO: I don't believe that's the case. I think he's bent over backwards to avoid making a representation of that fact.

MR. NORDLUND: Yes, Your Honor. And we did say that the rule was in effect, which I believe to be true. But the fact of the matter is, there's no evidence that it was known to employees anywhere and the only places that it was enforced is Highland and Bakersfield. And it would seem to be rather an extreme remedy when—you know, it was like somebody writing a rule and putting in a desk and nobody ever saw it. It was only enforced at two locations. And only enforced as to non-stranger employees, if you will, use my shorthand, and 3 years ago.

JUDGE CHARNO: I think I really would have preferred that as part of the oral argument on the case.

MR. NORDLUND: If I might, Your Honor, I think that we were not on notice at this request. I had conversations with General Council and the only place they were seeking an order was at Bakersfield and Highland, and I don't think she will deny that we had that conversation.

MS. RUBIN: That's true. I'm just responding to a request by Charging Party for a position.

MR. NORDLUND: Well, I think on the facts of this case where nobody's been disciplined, nobody's been injured, two people, there's only evidence of two individuals in the State of California that were asked to leave the premises, that a posting at those locations should be adequate 3 years ago.

JUDGE CHARNO: Well, I would hate for this to be the first decision that I ever issued that wasn't appealed by everyone. I'm going to deny your requests and the remedy incorporated in my order will go only to the two facilities.

MR. STROM: Your Honor, not even to the facility, the Alta Vista facility? That seems—

JUDGE CHARNO: Oh, I'm sorry, Claremont.

MR. STROM: They don't own Claremont.

JUDGE CHARNO: I would be interested in your position on that. Initially it seems to me that, yes, it would be appropriate since one of the employees whose rights were infringed, i.e., the right to organize their fellows. Both of the employees involved were Alta Vista, is that correct?

MS. RUBIN: Yes, Your Honor.

JUDGE CHARNO: So, it would be those three facilities.

MR. NORDLUND: Well, Your Honor, we would object to that. Again, my conversations with General Council, they're only seeking Bakersfield and Highland. And this is a change of position at a very—I was not even—this was not even raised before the decision was issued.

JUDGE CHARNO: True.

MR. NORDLUND: And I think it's a little late in the day and I was not—another surprise, big surprise.

MR. STROM: Counsel for the Charging Party's within its rights. If we had briefed this, we would have requested it in a brief. I mean, it's not—so, in that sense, there's no ---

MR. NORDLUND: Your Honor, it could have been requested in a brief, but it would have only been requested by Charging Party because General Council had informed me that she was not going to request it.

JUDGE CHARNO: Well, the devil by the demon of logical consistency, I'm going to go for three, but certainly not statewide. Any other matters to take up before I close the record?

(No response.)

JUDGE CHARNO: The hearing in this matter is closed. Thank you very much for your cooperation and patience over the last week.

(Whereupon, the hearing in the above-mentioned matter was closed.)

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights.

More specifically,

WE WILL NOT maintain or enforce any rule which provides that our off-duty employees may not return to the facility at which they work except to pick up a paycheck or make an authorized visit.

WE WILL NOT deny our off-duty employees, who are engaging in solicitation and/or distribution on behalf of the Hospital and Service Employees Union, Local 399, affiliated with Service Employees International Union, the Service Employees International Union, Local 22, affiliated with Service Employees International Union, or any other union, access to parking lots and other outside nonwork areas on the premises of facilities other than the ones to which those employees are assigned to work.

WE WILL NOT enforce our rule against solicitation or distribution by nonemployees on facility property in a manner so as to preclude our off-duty employees, who are engaging in solicitation and/or distribution on behalf of the Hospital and

Service Employees Union, Local 399, affiliated with Service Employees International Union, The Service Employees International Union, Local 22, affiliated with Service Employees International Union, or any other union, from having access to the parking lots and other nonwork areas at facilities other than the facilities to which those employees are assigned to work.

WE WILL NOT promulgate, maintain, or enforce a rule that prohibits you from distributing literature which we have not approved in nonwork areas during nonworktimes.

WE WILL NOT inform you that you may not distribute literature in nonwork areas during nonworktimes.

WE WILL, to the extent we have not already done so, rescind the rule contained in our employee handbook which states that our employees who are off duty may not "return to the facility unless [they] are picking up [their] paycheck or making an authorized visit" and we will notify you, in writing, that we have done so.

WE WILL permit our off-duty employees, whether or not they are assigned to any particular facility, access to our parking lots and other outside nonwork areas for the purpose of engaging in solicitation and/or distribution on behalf of the Hospital and Service Employees Union, Local 399, affiliated with Service Employees International Union, the Service Employees International Union, Local 22, affiliated with Service Employees International Union, or any other union.

VENCOR NURSING CENTERS WEST, LLC D/B/A, INTER ALIA, HIGHLAND NURSING & REHABILITATION CENTER, CALIFORNIAN CARE CENTER AND ALTA VISTA HEALTH CARE